

American Postal Workers Union, AFL-CIO (U.S. Postal Service) and Alan C. Haungs. Cases 3-CB-6901(P) and 3-CB-7089(P)

February 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 21, 1998, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, American Postal Workers Union, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order, as modified below.

1. Substitute the following for paragraph 2(a).

"(a) Request the United States Postal Service (USPS) to consider favorably Alan C. Haungs' grievances concerning USPS's refusal to furnish him a copy of the evaluation of Haungs sent to its Hawaii facility, and USPS's allegedly unfair and retaliatory evaluations, which allegedly caused Haungs to not be rehired at the USPS's facilities in Washington, D.C., St. Paul, Minnesota, and Atlanta, Georgia, and if it refuses to do so, promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence."

2. Substitute the following for paragraph 2(c).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent did not unlawfully refuse to process a grievance concerning Alan C. Haungs' alleged constructive discharge.

² In accordance with our recent decision in *Iron Workers Local 377 (California Iron Workers Employers Council)*, 326 NLRB 375 (1998), we shall modify the make-whole remedy set forth at sec. 2(c) of the judge's recommended Order.

As set forth in his partial dissent in *California Iron Workers Employers Council*, Member Hurtgen would order a full make-whole remedy in the event that the General Counsel can meet his evidentiary burden at compliance regarding the merits of the grievances.

"(c) In the event that it is not possible for the Respondent to pursue, on Alan C. Haungs' behalf, grievances that Haungs sought to file concerning his supervisory evaluations, and if the General Counsel shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, make Haungs whole for any increase in damages he suffered as a consequence of the Respondent's refusal to process the grievances, with interest."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to file and/or to process grievances on behalf of any employee because that employee filed charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL request the United States Postal Service (USPS) to consider favorably Alan C. Haungs' grievances concerning the USPS' refusal to furnish him a copy of the evaluation of Haungs sent to its Hawaii facility, and the USPS' allegedly unfair and retaliatory evaluations, which allegedly caused Haungs not to be rehired at the USPS' facilities in Washington, D.C., St. Paul, Minnesota, and Atlanta, Georgia, and if it refuses to do so, WE WILL promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence.

WE WILL permit Alan C. Haungs to be represented by his own counsel in the grievance and arbitration procedure, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL, in the event that it is not possible for us to pursue, on Alan C. Haungs' behalf, the grievances that he sought to file concerning his supervisory evaluations, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, make Haungs whole for any increase in damages he suffered as a consequence of our refusal to process the grievances, with interest.

AMERICAN POSTAL WORKERS UNION, AFL-CIO

W. Francis Trezevant, Esq., for the General Counsel.
Andrew P. Fleming, Esq. (Walsh, Fleming & Chiacchia, P.C.),
 of Blasdell, New York, for the Respondent.
Peter Gallaudet, Esq., of Windsor, Connecticut, for U.S. Postal Service.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed in the above cases by Alan C. Haungs, an individual, the Regional Director for Region 3 issued an order consolidating cases, amended consolidated complaint on February 27, 1997, alleging that the American Postal Workers Union, AFL-CIO (the Respondent or the Union) violated Section 8(b)(1)(A) of the Act, by failing and refusing since December 1995 to process grievances filed by Haungs concerning his constructive discharge, and since June 20, 1996, concerning Haungs' rejection by the U.S. Postal Service (the Employer or USPS) for employment, based on his personnel folder and supervisory evaluation, because Haungs engaged in dissident union activity, because Haungs was not a member of the Union, and for other arbitrary, and invidious reasons, and with respect to the grievance concerning Haungs' rejection for employment, because Haungs filed an unfair labor practice charge against the Respondent in Case 3-CB-6901(P).

The trial with respect to the allegations in the above complaint was held before me in Buffalo, New York, on September 22 and 23 and December 3 and 4, 1997. Briefs have been filed and have been carefully considered. Based on the entire record,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

USPS provides postal services for the United States and operates various facilities throughout the United States, including facilities located at 1200 William Street and 55 Monsignor Valente Drive, in Buffalo, New York. The Board has jurisdiction over the USPS and the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA).

¹While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings I hereby discredit.

The Respondent is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Haungs began his employment at USPS in April 1987 as an electronic technician at its facility on William Street in Buffalo. He was a member of Respondent for the first 6 years of his employment.

At some point undisclosed by the record, Haungs was appointed shop steward for the Respondent. In April 1993, he was demoted to alternate shop steward based on the recommendation of Craig Marcheson, the Respondent's craft director. According to Haungs, after he was informed of the demotion, he asked Marcheson why he was demoted. Haungs asserts that Marcheson replied that Haungs would go "over my head, you call Washington," referring to Haungs' habit of calling Randy Sutton, Marcheson's superior at the national office.

Marcheson denies that the decision to demote Haungs had anything to do with Haungs' calls to Sutton, and asserts that he demoted Haungs because in Marcheson's view, Haungs was not able to settle any grievances. Marcheson adds that he never criticized Haungs for speaking to Sutton or "going over his head," but admits that he did ask Haungs to keep him informed of what Sutton and Haungs discussed.

Additionally, according to Marcheson, undenied by Haungs, at some point after Haungs was demoted to alternate shop steward, Haungs changed his shift, and Marcheson was responsible for Haungs being reappointed as shop steward.

On November 11, 1993, Haungs gave a letter to the Respondent's president, Frank Resetarits, explaining why he was resigning as shop steward. In the letter he made only positive statements about his experiences as shop steward, and indicated to Resetarits that he was resigning primarily to spend more time with his family. Haungs made no reference in this letter to any of his prior disagreements with Marcheson, or his prior demotion to alternate steward. Haungs testified that he did not do so because "it was not a burning issue that I and Mr. Marcheson had disagreements" and further admitted that the disagreements were "not a big deal."

On December 18, 1993, a USPS employee Art Lonczak threatened fellow employee Tom Dunford that he (Lonczak) would kill Dunford and his family and burn his house down. Two days later, Lonczak told Dunford that he was going to kill Dunford and his brother Michael Dunford. Lonczak added that he had no family, or wife and that if he killed Dunford, he had nothing to lose. On or about December 29, Lonczak in the course of an argument with Tom Dunford indicated that he knew how to make bombs that work.

In early 1994, Lonczak informed Haungs that he had told Dunford that he was going to rape Dunford's wife, burn his house, and kill his dog. On or about April 14, 1994, Haungs discovered a comment written in the logbook under one of his entries, "why don't you track a dummy." Haungs then asked a group of his coworkers whether any of them had written this remark. Lonczak responded, "I wrote it, and everybody knows you're a fucking dummy." Later in the day, another employee, Lou Barnas asked Haungs whether he was going to tell the postal inspectors about the log book entry. Haungs replied that if he was threatened before witnesses, then he would tell the postal inspectors about it. Lonczak, who was present at the time, interjected, "You're not going to live long enough to have witnesses." Haungs responded, "That sounds like a threat to me," and the conversation ended.

Haungs did not immediately report this incident, since the post office has a zero tolerance policy for threats, but after a week and a half, he decided to report the conversation to Maintenance Manager William Fulcher. Fulcher instructed Haungs to report the incident to the postal inspectors. Haungs complied with Fulcher's request, and a week and a half later was able to reach a postal inspector named Moehring. Haungs related the incident to Moehring over the phone, and furnished the name of the other employees who were present at the time. Haungs added that he did not think that the witnesses, Barnas and Brenner, would be of much help because they are friends with Lonczak. Moehring took the information, but never informed Haungs of the results of the investigation.

Fulcher also reported to Haungs' accusations against Lonczak to the postal inspection service. Subsequently Fulcher received a call from Inspector Barney Morrison who was assigned the case, and Fulcher related the details of Haungs' assertions concerning Lonczak, including the names of the alleged witnesses. Shortly thereafter, Inspector Morrison called Fulcher and informed him that the charges had not been substantiated.

In June 1994, Haungs resigned as a dues-paying member of Respondent. Sometime in mid-June 1994, Fulcher convened a meeting of all maintenance employees. Fulcher began the meeting by stating that there had been recent reports of threats in the department, and that he had gotten the postal inspectors involved. Fulcher added that if this doesn't stop he would fire people who are engaging in such conduct. Haungs brought up the incident with the logbook and Lonczak and asked why nothing was done about it. Supervisor Art Adamczyk interjected that he had spoken to Lonczak about it and that he had so informed Haungs. Haungs denied that he had been so informed by Adamczyk, and they argued back and forth about that subject.

On June 22, 1994, Haungs was referred to the post office's employee assistance program (EAP) by management. The referral reflects that the post office had received complaints from other employees about Haungs. Haungs was not pleased about this referral, and he approached the Respondent's shop steward Miranda to file a grievance over this action. Miranda filed a grievance over the matter as requested.

In management's step one response to the grievance, it asserts that it received many complaints about Haungs from other employees, including from two union representatives. The two union representatives were Marcheson and Tom Kaczmarek, who informed Supervisor Rick Adams that they had received complaints from other employees about Haungs' behavior.

Eventually the post office agreed to destroy the memorandum referring Haungs to the EAP, and notified Haungs by memo dated August 30, 1994, that the memo was shredded.

In October 1994, Lonczak approached employee Paul Schulz and said, "I can put you in the ground, I can run you down with my car, I can take you out." Lonczak then added, "I can take them people out too." Schulz testified that although Lonczak did not identify who he meant by "them people," Schulz believed that Lonczak was referring to Haungs and employee Bruce Adams. According to Schulz, in the past Lonczak had made statements while employees were sitting around, that he did not like Haungs and Adams. Based on these prior comments, Schulz asserts that he believed that Lonczak was referring to Adams and Haungs.

Schulz immediately reported Lonczak's comments to Marcheson. Marcheson told him to calm down and indicated that he would speak to Lonczak about the matter. Marcheson also told Schulz that if he carried "this too far, this guy could lose his job."

Subsequently, when Bruce Adams arrived at work, he heard in the shop that Lonczak had threatened to kill Adams, Haungs, and Schulz. On further inquiry, Adams found out that the alleged threat was made directly to Schulz. Adams then confronted Schulz who informed Adams that Lonczak had said to Schulz, "I'm going to kill you first, and then I'm going to go after those other two guys." Adams asked Schulz if he reported Lonczak's conduct to management. Schulz replied that he had not done so, because he was afraid that Lonczak might get fired. Adams asked if Schulz had any objections to Adams reporting it to management, and Schulz agreed.

Adams then spoke to Fulcher and reported what Schulz had related about Lonczak's conduct. Fulcher stated to Adams, "I'll fire him if he said that." Fulcher added that he would check the matter out. Fulcher immediately spoke to Schulz and asked him if Lonczak had threatened him. Schulz replied not exactly. Fulcher specifically asked if Lonczak had threatened to kill him. Schulz answered, "no, but I could tell by the look in his eyes." Fulcher then told Schulz that since he had received a report of a threat, he was going to turn the matter over to the inspection service.

Later on that day, Fulcher informed Adams that he had spoken to Schulz and that Schulz had not confirmed that Lonczak had threatened to "kill" him as Adams had related. Adams then went back to Schulz and asked why he had not confirmed to Fulcher what he had related to Adams about Lonczak's conduct. Schulz replied that he did not want to tell Fulcher exactly what happened, because Schulz was afraid that Lonczak would get fired and he (Schulz) did not know what Lonczak would do if that happened.

In fact Fulcher did report the matter to the inspection service. Subsequently a postal inspector reported to Fulcher that the service had conducted an investigation and found no substantiation of any threat made by Lonczak.

Meanwhile, after the incident, Schulz tried to stay out of Lonczak's way and asked his supervisors Henry Ciemoch and Rick Adams if he could be separated from Lonczak. Both of these supervisors informed Schulz that it was post office policy not to separate employees, and that if they separate one employee, they would have to separate others as well. Since that time Schulz continued to work in the same building with Lonczak on numerous occasions, including several times in the detached mail unit (DMU). From 1994 to November 1995, Schulz worked directly with Lonczak on the same project on approximately a half dozen occasions.

Haungs found out about the Lonczak-Schulz discussion from Bruce Adams, who reported to Haungs what Schulz had related to him. According to Haungs, he was sure that Lonczak was referring to himself and Adams, although their names were not mentioned by Lonczak, since it was clear that Lonczak did not like them. Haungs also adds that Lonczak had threatened him before as related above in April 1994. Therefore, Haungs was very upset about this report and immediately went to see Supervisor Art Adamczyk. Haungs told Adamczyk that Lonczak had "threatened me and Paul Schulz." Adamczyk replied that Fulcher is aware of it and is taking care of it.

In November 1994, Haungs was assigned to work in the DMU along with Lonczak. Since the DMU is a separate building from the main building (GPO) where most of the work is performed, Haungs protested this assignment. He spoke to Supervisor Rick Adams and told him that he did not want to work in the same building with Lonczak, because Lonczak had threatened Haungs twice. Adams instructed Haungs to call Fulcher which he did. Fulcher did not change the assignment, but did call the postal inspectors, who interviewed Haungs on that day. The inspectors also interviewed Lonczak, but according to Haungs the inspectors did not interview Schulz, because Schulz did not come to them.

The next day, Haungs was again assigned to the DMU along with Lonczak. Haungs again protested the assignment to Supervisor Adams, and told Adams that he did not want to work with Lonczak. Adams replied he could not accommodate Haungs' request, and that assignments are based on the needs of the postal service. Subsequent to this refusal of the postal service to change his assignment, Haungs filed an EEO complaint protesting this action, and asking that he be separated from Lonczak and or mediation.

In January 1995, Haungs spoke to Shop Steward Thomas Kaczmarek about the situation. Haungs informed Kaczmarek that he felt unsafe working with Art Lonczak at the DMU, because Lonczak had previously had threatened him. He also told Kaczmarek that he was unhappy about the progress of the post office's investigation of his allegations. He asked Kaczmarek to file a grievance about management's failure to separate him from Lonczak. Haungs did not furnish Kaczmarek with any specific details as to when and how Lonczak had threatened him. Kaczmarek replied that he would investigate Haungs' complaints and would notify Haungs of the results.

On January 28, 1995, Haungs followed up his oral request of Kaczmarek with a written memo relating that he had notified management of two threats by Lonczak to "kill" him, and that he wanted information as to the results of the post office's and/or the inspection service's investigation.

Kaczmarek investigated Haungs' complaints by speaking to several employees including Lonczak, as well as Supervisor Rick Adams. None of the employees with whom he spoke

confirmed that they had heard or were aware of any threats made by Lonczak to Haungs.² He also spoke to Lonczak, who denied making any threats to Haungs. Supervisor Adams also informed Kaczmarek that he had conducted an investigation, which also included speaking to Lonczak, and came up with nothing to substantiate Haungs' allegations of threats. Adams also informed Kaczmarek that the Postal Inspectors had also previously conducted an investigation of Haungs' assertions, and had found no substantiation of any threats made by Lonczak. Kaczmarek therefore provided a memo to Haungs, dated February 2, 1995, stating "upon completion of an investigation concerning your complaints, there is no contractual violation."

Haungs then sent a letter to Marcheson, asking him questions about the status of the investigation of his complaints by management, and making reference to Kaczmarek's response to him, which Haungs did not consider satisfactory, and accusing Kaczmarek of refusing to speak to management on Haungs' behalf.

Marcheson responded to Haungs by letter dated February 13, 1995. This letter asserts that Marcheson asked Kaczmarek if Kaczmarek and management investigated Haungs' claims and was informed that in fact Kaczmarek had investigated his contentions. The letter also asserts that Marcheson reviewed Haungs' claims, and finds that Kaczmarek was correct by telling Haungs that there was no contractual violation.

On February 21, 1995, Haungs wrote two letters, one to Marcheson and one to Fulcher, asking similar questions about the status of the various investigations concerning his complaints.

By letter dated March 3, 1995, Marcheson responded to Haungs. The letter essentially reiterated Marcheson's earlier response that Haungs' concerns were previously investigated, and he was given written notice that the Union concluded that there was no contract violations.

Haungs' letter to Fulcher resulted in a meeting between them on or about March 10, 1995. Haungs repeated his accusations against Lonczak to Fulcher, as well as his request to be separated from Lonczak. Fulcher informed Haungs that the inspection service had been informed of both incidents that he had reported, and found no substantiation of the threats. Therefore Fulcher could not keep Haungs and Lonczak separated due to the postal service's work duties. Fulcher added that he would again report Haungs' allegations to both the postal inspectors and to labor relations, and suggested that if he had any proof of his allegations, he should submit same to the postal service. Fulcher, immediately after the meeting, reported Haungs' allegations to both labor Relations and to the postal inspectors on March 13 and 14, respectively.

²Kaczmarek admits that he did not speak to Paul Schulz. However, there is no evidence that Kaczmarek was aware that Haungs had asserted that the threat made by Lonczak to harm Haungs was made directly to Schulz.

Haungs at that point spoke to various employees in an attempt to obtain the “proof” that Fulcher requested. After obtaining statements from David Needham, Michael Dunford, and Bruce Adams, Haungs submitted these statements, along with his own statement of the relevant events, to Fulcher. Needham’s statement, dated March 19, 1995, asserted that Paul Schulz was so upset over a “then recent threat to his life” by Lonczak, that he (Schulz) couldn’t perform his duties.

Dunford’s statement reflected that he had heard Schulz say that Lonczak had threatened to kill Schulz and to run him down with his car. Bruce Adams submitted a statement essentially reflecting how he testified in this proceeding.

After reading the additional “proof” submitted by Haungs, Fulcher concluded that there was still no substantiation of Haungs’ allegations, since all these statements contained strictly “hearsay” information. Fulcher did however forward these statements to the Inspection Service.

In May 1995, Mike Dunford the older brother of Tom Dunford met Lonczak at a local bar. Dunford told Lonczak to leave his brother alone at work. Lonczak replied, “Your brother’s a fucking asshole.” The conversation concluded. A few minutes later, while Dunford was drinking a beer, Lonczak grabbed Dunford’s ear, and attempted to pull his head down. Dunford slapped Lonczak’s hand off his ear, and slapped Lonczak across the head a few times. Dunford then pushed Lonczak up against the bar, and other people then got between them and broke up the scuffle.³

On or about May 1, 1995, Haungs filed another EEO complaint alleging “reverse age discrimination,” claiming that the postal service discriminated against him by failing to separate him from Lonczak as he requested, while at the same time allowing other named and presumably “older” employees to work in “preferred areas.”

On or about July 14, 1995, Haungs and Lonczak were again both assigned to work at the DMU. Haungs approached Supervisor Mike Sloan and informed him that Lonczak had threatened him twice before, and he did not want to work with Lonczak at the DMU. Sloan responded in a joking manner, “I’m here, I’ll protect you don’t worry.” Two hours later Sloan left the DMU. Haungs worked the remainder of the shift. Haungs did not recall how long Lonczak remained at the DMU on that day.

Haungs immediately filed another EEO complaint against Sloan, for failing to assign Haungs to a different building than Lonczak. In his statement of incident activity attached to this complaint, he accused Sloan of leaving the building (DMU) while Lonczak was still there at 2:30 p.m., and asserting that Sloan failed to provide for Haungs’ safety. The statement adds that Sloan is a friend of Lonczak and resents previous EEO activity against him by Haungs. Finally the report states that Sloan “is hoping that Art Lonczak will kill me.”

Sometime in September 1995, Haungs and Lonczak were once again assigned to work at the DMU. Once more Haungs stated to Sloan that he did not want to work with Lonczak at the DMU. Sloan instructed Haungs that if he was so afraid to work with Lonczak, to “punch out and leave the building.” Haungs did so and requested the presence of a union steward. Eventually, Kathy English, a union steward for the custodians, spoke to Haungs about his situation. English then made several attempts to speak to various officials of the post office on

Haungs’ behalf, but was unsuccessful in persuading them to allow Haungs to go back on the clock or to be separated from Lonczak.

However, after this incident, Haungs was not assigned to work with Lonczak at the DMU for several months, until November 15, 1995, when such an assignment was again made. When Haungs could not find his supervisor to protest this action, he complained to William Downes, plant manager of the post office Williams Street facility. Downes instructed Haungs to report to Supervisor Heimoch, whereupon, Heimoch assigned Haungs to work at the GPO.

Two hours later, Haungs was called into a meeting in Downes’ office. Present were Lonczak, Fulcher, Marcheson, and Downes. Downes stated that the objective of the meeting was to clear up the issue between Lonczak and Haungs. Downes asked Lonczak if he had threatened Haungs. Lonczak emphatically denied ever threatening Haungs and stated that he was not a violent person. Downes responded that he did not know whether Lonczak threatened Haungs or not,⁴ but “I’m telling you right now, if you do anything like that, I’m going to fire you, pure and simple.” Downes then turned to Haungs and told him that he expected Haungs to work with Lonczak from now on. Haungs continued to insist that Lonczak had threatened him and requested that he not be assigned to work with Lonczak at the DMU. Downes replied that he could not have people picking and choosing where they’re going to work, and instructed Haungs that he was going to work where he’s told to work just like everyone else.

Haungs was then told to leave the meeting, and Downes reiterated to Lonczak that if he ever threatened anyone he would be fired, as well as telling Lonczak that he should not be criticizing the work of other employees.

On November 29, 1995, Haungs reported to work and was assigned to the DMU. He asked Supervisor Ceimoch whether Lonczak was going to be assigned there as well. Ceimoch said yes. Haungs responded that he couldn’t work there because Lonczak had threatened him, and added that he would not go to the DMU if Lonczak was there. Ceimoch called in Supervisor Miller, who in turn called Fulcher. A long discussion ensued between Haungs, Miller, and Fulcher, during which Haungs continued to insist that he would not work with Lonczak because of the threats, and Miller or Fulcher refusing to reschedule Haungs and informing him that he must perform the job assigned to him. Finally, Haungs was asked whether he was defying a direct order. Haungs replied, “I’m not going to work with this guy.” He was then told to punch out and leave the building. Haungs complied and left work.

⁴Downes testified that he had previously been made aware of Haungs’ allegations of threats by Lonczak, and had checked with the postal inspectors and was informed that Haungs’ allegations had been investigated, and found not to have been substantiated and consisted of alleged threats several years back.

³Dunford is much bigger and stronger than Lonczak.

The next day, November 30, 1995, Haungs reported to work and his timecard was missing. He was told that he was marked AWOL for the prior day. When he received his assignment for that day, he again was told that he would be working at the DMU along with Lonczak. Once again he refused to work with Lonczak, and once again Supervisor Miller was called in and ordered Haungs to work where he was assigned. According to Haungs, he then requested to speak to a union steward. Miller called over Shop Steward Dave Spanitz, and Haungs asserts that he asked Spanitz to file a grievance for him because he couldn't work with Lonczak. According to Haungs, Spanitz refused to file a grievance on his behalf, telling him that the threats occurred a long time ago and he (Lonczak) didn't mean it. While they were talking, Miller came over and told Haungs to leave the building.

Spanitz has a somewhat different recollection of the events. According to Spanitz, Haungs did not either ask for a steward or ask him to file a grievance. Spanitz asserts that he became involved when Miller summoned him and told him to tell Haungs that he had 15 minutes to get out of the building or return to work. Spanitz transmitted this message and added that Haungs must be responsible for his own actions.

Under either version, it is clear that Haungs left the building. According to Haungs, as he was leaving the facility and starting to drive home, he thought that the post office was going to continue to assign him to work with Lonczak, and since he was not going to work with him, he would be fired anyway. Therefore, he turned his car around, drove back to the facility, and resigned. The resignation form that he submitted reads as follows: "Technician Art Lonczak has threatened to kill me twice on the clock, so to prevent Art Lonczak from killing me I am quitting my job."

Prior to submitting the form he spoke to Fred McNamara, a labor relations official of the post office, who tried to talk Haungs out of his decision to resign. However, Haungs testified that he was determined to quit, and McNamara wasn't going to talk him out of it. Haungs added, "I could see this I was not paranoid, these people were mad at me, a group of people were mad at me and this whole situation fell right into their hands, this is perfect for them. I'm going to give them what they want, I'm out of here, it's not worth it to work with this guy, it's not worth it."

Haungs also had a conversation on that day, prior to resigning, with William Cummings who had been previously craft director of the Union, and who had appointed Haungs as shop steward. Haungs informed Cummings that he did not want to work at the post office anymore because they were continuing to assign him to work at the DMU with Art Lonczak. Cummings urged Haungs not to resign and suggested various other options that he could follow. Cummings suggested talking to a steward, filing a grievance, calling the union president or calling a union representative in Washington if he did not want to talk to the craft director.⁵ Cummings also suggested that Haungs could go out on compensation for job-related stress.

Cummings emphasized that if Haungs quit it would be a big step, and if he resigned he would be giving up his right to be represented because the Union represents employees but not people off the street who are no longer postal employees. The

conversation ended, without Haungs telling Cummings whether or not he was going to resign.

According to Haungs, the next morning, December 1, 1995, he received a call from William Trezevant of the Labor Board, who allegedly told him that "I had to tell a Union steward to file a constructive discharge grievance for me."⁶ In that connection Haungs further testified that he first was told about the term "constructive discharge" by a fellow union member Roland Johnson on the day that he quit. Haungs admitted that he had "never heard of this. I figured you quit, you're dead."

Therefore on December 1, 1995, Haungs spoke to Marcheson outside the facility. Haungs informed Marcheson that the Labor Board has told him to tell Marcheson that he must file a constructive discharge grievance on Haungs' behalf. Marcheson replied that since Haungs had resigned he was no longer a post office employee, the APWU only represents employees of the post office, and therefore the Respondent could not represent him. Marcheson testified that he had never heard the term constructive discharge and did not know what it meant. He also admits that he did not ask the union president about the issue of a constructive discharge, and whether he knew what it meant, since he (Marcheson) had gotten an extension of time from management, and felt that the Respondent could deal with it if the Labor Board determined that the Union had to represent him.

Marcheson then went to speak to Supervisor Miller. Marcheson informed Miller that he had been asked by Haungs to file a grievance and he had told Haungs that it was the Union's position that it could not file a grievance on his behalf. However, Marcheson added that he knew that Haungs is going to the Labor Board and the Labor Board had in the past come up with some decisions that Marcheson did not understand. Therefore, Marcheson said to Miller that if the Labor Board tells the Respondent that it is supposed to file a grievance for him, he did not want the post office to raise the time limits issue. Miller replied that he felt that the Union was right in what it was doing, and he had no problem with not raising time limits.

The next day, Marcheson spoke with Fulcher. He told Fulcher that he had asked for an extension from Miller because he was unsure of what the Labor Board would do, and went through the same discussion that he had with Miller. Fulcher responded yes that it was okay and he had no problem with an extension.⁷

⁶ Haungs provided no explanation as to why Trezevant would be calling him, since he had not filed any charges as yet.

⁷ I credit Marcheson's testimony that he received oral agreements from both Miller and Fulcher for an extension of time to file a grievance. I note that Fulcher could not recall whether he so agreed, but did not deny that he had done so. Miller did not testify.

⁵Haungs had made many previous complaints to Cummings about his dissatisfaction with the local union leadership.

On December 1, 1995, Haungs filed the charge in the instant case against the Respondent, alleging that it violated Section 8(b)(1)(A) by refusing to file a grievance over Haungs' constructive discharge.⁸

Subsequently Marcheson and the Union's president had several conversations with the board agent, who explained to them what constructive discharge meant. Finally on May 31, 1996, the Respondent decided to file a grievance on Haungs' behalf alleging a "constructive discharge, in order to protect ourselves."⁹ During the processing of this grievance, the postal service consistently took the position that the grievance was untimely, and that Haungs was not an employee because he resigned. In Fulcher's step 2 response to Stiegler dated May 31, 1996, he states "this grievance is filed on behalf of a former employee who tendered his resignation on November 30, 1995. Given that he ended his postal employment effective that day, this grievance is improper in that Mr. Haungs is not an employee in the regular work force as per article I of the National Agreement and cannot be represented by the APWU as such."¹⁰

The letter also alleges that the grievance was untimely and that on the merits, there was no evidence presented to substantiate Haungs' contention that an unsafe condition existed on either November 29 or 30, 1995.

The Union thereafter filed for arbitration, which was held on June 11, 1997. The arbitrator's decision was issued on July 17, 1997, finding the matter not to be arbitrable, because it was not timely filed.

The arbitrator recited the history of the dispute, including the Respondent's refusal to initially process the grievance because Haungs had resigned. The arbitrator noted specifically that both the post office and the Union initially concurred that the grievant had no standing to file a grievance since the parties believed that Haungs had resigned of his own free will. The arbitrator then noted that several arbitration decisions cited by the Union supported such a position, one of which the arbitrator quoted. The arbitrator then noted that the matter was complicated by the admitted lack of knowledge of the Union of the theory of constructive discharge.

The arbitrator recited the conflicting testimony given at the arbitration, as to whether an oral extension of time had been agreed to by the parties. The Respondent presented Marcheson, who testified to having obtained such an oral extension, supported by the union president, who asserted that he had been told by Marcheson that such an extension had been agreed to by management. The president also testified therein that after the NLRB informed him about the theory of a constructive discharge, he consulted an attorney who advised him to file a grievance on Haungs behalf. Fulcher also testified at the arbitration, and denied having agreed to any extension of time.¹¹

The arbitrator, after reviewing the conflicting testimony, observed, "while the Union may initially have sought an extension of time to file a grievance, and management may have

concurred, no actual proof of such events other than the conflicted testimony of the witnesses was presented."

The arbitrator then concluded that since the Respondent had not obtained any extensions in writing, and had not made any prior written claim concerning such an extension at earlier steps of the grievance procedure, that he could not find that such an extension had been agreed upon by management. Therefore he found the grievance not to be arbitrable.

The General Counsel presented evidence that it believed established the Respondent's animus towards nonunion members. Bruce Adams testified that sometime in 1988 he received training to be a shop steward from Union President Frank Resetarits. According to Adams, Resetarits told him at that time, that with regard to nonmembers, "generally, we represent them less strenuously than we do the members, but we do what we have to." Resetarits denies ever making such a statement to Adams and further denies that he was ever involved in training of Adams as shop steward.

The Respondent produced uncontradicted evidence that it has processed numerous grievances of nonmembers, including many on behalf of both Bruce Adams and Haungs after they became nonmembers, and that some of these grievances resulted in the granting of the relief requested by the grievant.¹²

The General Counsel also introduced copies of the Buffalo Bison, a newspaper published by the Local Union in 1994 which contains criticism of employees for not being members of the Union and referring to them as "Scabs." Also introduced was "Scab Dart Board" from the paper, which contained the names of various nonmembers, including Haungs and Bruce Adams.

At various times in 1996, Haungs testified that he applied to various positions at a number of other post office facilities. According to Haungs, after having submitted resumes to those facilities, he was rejected for employment because of poor evaluations from supervisors, which he considered to be unfair. He received letters from these facilities stating that he could not get along with others. Haungs then sent a letter to John Stiegler, craft director, dated June 20, 1996, which asserts that the post office is retaliating against Haungs for having filed a grievance and an NLRB and EEO complaint regarding his constructive discharge. Haungs relates that several post offices had shown interest in hiring him, but rejected hiring him because of supervisory evaluations or material in his personnel folder. Haungs asked Stiegler to get his personnel folder and all supervisory evaluations, and file a grievance against the post office for its retaliation.

⁸ Haungs also filed a charge against the post office in Case 3-CA-1969(P) on the same date.

⁹ By this time John Stiegler had replaced Marcheson as craft director.

¹⁰ In this regard, Downes testified that this had always been the position of the post office, and that this position had been sustained in several arbitrations.

¹¹ Note that in this proceeding, Fulcher did not deny having so agreed, and testified that he did not recall whether he had done so.

¹² For example the Union was successful in convincing the post office to destroy the EAP referral about which Haungs filed a grievance.

According to Haungs, after sending this letter to Stiegler, he spoke to Stiegler about the request. Stiegler allegedly told Haungs that because he is no longer an employee, Stiegler does not have to file grievances for him. At around the same time, Haungs asserts that he had another conversation with Stiegler, during which Stiegler allegedly said, "because you have filed a charge with the National Labor Relations Board; we are not going to file a grievance for you."

On November 14, 1996, Haungs filed a charge in Case 3-CB-7089, alleging that the Respondent violated Section 8(b)(1)(A) of the Act by refusing to file a grievance for Haungs because he filed a charge under the Act against the Respondent.

Subsequently Haungs sent two more letters to Stiegler, one on March 1, 1997, and the other not dated, wherein Haungs makes specific comments about unsatisfactory evaluations that he had received copies of which had been sent to the post office's St. Paul, Minnesota, Washington, D.C., and Atlanta, Georgia facilities. Haungs also noted that the Honolulu, Hawaii facility refused to send him a copy of his evaluation that it allegedly received. In these letters, Haungs requested that the Respondent grieve the allegedly defamatory comments in the evaluations sent to the three facilities, and to grieve the fact that the post office failed to provide him with the evaluation concerning him sent to the Honolulu facility.

The Respondent adduced no evidence of what efforts, if any it made on Haungs' behalf with respect to these letters, or why it did not file a grievance on his behalf, as he requested. Stiegler did deny that he told Haungs that Respondent would not file grievances for Haungs because he filed a charge with the National Labor Relations Board. Stiegler however did admit that he told Haungs that Haungs was "suing" the Union and that he did not know if he had to file a grievance on his behalf. According to Stiegler, this conversation related to an assertion by Haungs that two other employees Beck and Bazzone had been separated because of a problem between them, which related to Haungs' constructive discharge grievance. Stiegler asserts that Haungs wanted the Respondent to file another grievance against the post office alleging disparate treatment by separating these employees and not allowing the same privilege to Haungs. Stiegler further testified that he investigated Haungs' claim and concluded that the two employees were not separated because of any problems between them, but that they were normally rotated.

III. ANALYSIS

A. *The 10(b) Issue*

The Respondent argues that the instant complaint should be dismissed insofar as it relates to the charge in Case 3-CB-6901(P) because it was not filed within 6 months of the alleged unlawful conduct. The Respondent recognizes that the complaint allegation that it violated the Act on December 1, 1995, by refusing to process the grievance of Haungs concerning his alleged constructive discharge is related to a timely charge filed on or about that date.

However, the Respondent asserts that since the National Labor Relations Board focuses on the date of the alleged unlawful act, rather than the date its consequences became effective, the instant charge is untimely. The Respondent argues in this regard that the unlawful acts that are the focus of Haungs' complaint occurred in January through March 1995, when he first brought his complaints about Lonczak's alleged threats to him, and the post office's failure to properly respond to these threats,

to the Union. Thus when the Respondent notified Haungs in February and March 1995 that it would not file a grievance on Haungs' behalf, this is the operative date, according to the Respondent, for measuring the 10(b) period. I do not agree.

It is true that the General Counsel did introduce evidence of the Respondent's conduct in dealing with Haungs in early 1995, and does assert that the Respondent acted improperly at that time. However, the General Counsel does not seek a finding that the Respondent violated the Act in 1995, and seeks only to utilize evidence of such conduct as background to shed light on the Respondent's motivation for conduct within the 10(b) period, i.e., the refusal to process Haungs' constructive discharge grievance. Since a finding that such action is unlawful is warranted without "giving independent and controlling weight" to events occurring more than 6 months before the filing of the charge, it is appropriate to consider such events as background to assess the Respondent's motivation within the 10(b) period. *Grimway Farms*, 314 NLRB 73, 74 (1994); and *Douglas Aircraft Co.*, 307 NLRB 536 fn. 2 (1992).

I therefore reject the Respondent's 10(b) defense and shall decide the case on the merits.

B. *The Refusal to Process Haungs' Constructive Discharge Grievance*

Before discussing this allegation it is appropriate to consider an allegation raised by the General Counsel for the first time in his closing argument. He argued therein that the Respondent also violated Section 8(b)(1)(A) of the Act by the conduct of Shop Steward Spanitz in allegedly refusing to process Haungs' grievance on November 30, 1995, based on the post office's refusal to separate him from Lonczak. I have serious questions as to the propriety of deciding such a contention, inasmuch as the complaint neither makes any reference to such an allegation, nor asserts that Spanitz is an agent of the Respondent.

However, I need not decide the procedural aspect of this issue, since I do not credit Haungs' testimony that he requested or that Spanitz refused to process his grievance on November 30, 1995. I was not overly impressed with Haungs' testimonial demeanor. He was frequently argumentative or evasive, and exhibited a tendency to fail to answer the question put to him, and instead to relate what he felt was significant. In this instance, I also found Spanitz' version of events to be more believable and reliable. Thus I agree with the Respondent's argument that had Spanitz blatantly refused to process Haungs' grievance as Haungs asserted that Haungs would not have simply accepted this action. Based on Haungs' personality and his prior actions, I conclude that he would have gone over Spanitz' head to Marcheson or the union president or even to the national office if Spanitz had engaged in such conduct.

Therefore, since I credit Spanitz that Haungs never asked him and he therefore did not refuse to process Haungs' grievance on November 30, 1995, I shall recommend dismissal of this contention.

Turning to the "constructive discharge" grievance, the General Counsel contends and the complaint alleges that the Respondent failed and refused to process this grievance for arbitrary, unfair, and invidious reasons, such as Haungs' nonmembership in the Union and because Haungs engaged in dissident union activity.

I find that the General Counsel has fallen far short of establishing that the Respondent's decision not to process Haungs' grievance was motivated by either his nonmembership in the Union or his alleged "dissident" activity. The only evidence of any conceivable "dissident" activity, engaged in by Haungs was his prior disputes with Marcheson when Haungs was shop steward, which included Haungs going over Marcheson's head to speak to Marcheson's superiors about certain matters.

While Haungs' testimony would support the conclusion that Marcheson may have demoted Haungs to alternate shop steward because he engaged in such conduct, it does not establish that there was any connection between this activity¹³ of Haungs and the Respondent's decision not to process his grievance. I note in that regard that the "demotion" occurred in April 1993, some 2-1/2 years before the refusal to process Haungs' grievance, and that shortly after the demotion, Marcheson reappointed Haungs as shop steward on another shift.

I therefore conclude that the General Counsel has not shown any casual connection between any perceived hostility towards Haungs by Marcheson because of Haungs' alleged "dissident" activity, and the Respondent's decision on December 1, 1995, not to process his grievance. *Local 751 Machinists (Boeing Co.)*, 270 NLRB 1059, 1066 (1984).

I find similarly with respect to the contention that the Respondent's decision was motivated by the fact that Haungs was not a union member. The General Counsel has presented no probative evidence of any animus towards Haungs for his nonmembership in the Union, or for that matter towards nonmembers. While in its publications, Respondent made critical comments about nonmembers and referred to them as scabs, such evidence has little significance. *American Postal Workers (Postal Service)*, 269 NLRB 995, 998 (1984). Such statements were a legitimate method of attempting to organize, and do not suggest any intent not to process grievances of nonmembers.¹⁴

I do not credit the vague and unconvincing testimony of Bruce Adams that while in shop steward training, the Respondent's president, Resetarits, made statements to him indicating that it represents nonmembers not as vigorously. Even if credited, this comment made in 1987, is hardly sufficient to establish that the Respondent's actions in 1995 were motivated by Haungs' nonmembership.

Most importantly of all is the unrefuted evidence that the Respondent presented that it has processed numerous grievances of nonmembers, including several for both Bruce Adams and Haungs and some of them resulted in the relief requested by the grievant. *Molders Local 256 (U.S. Pipe & Foundry)*, 253 NLRB 969, 972 (1980).

Therefore, I conclude that the evidence fails to establish that any dissident activity of Haungs or his nonmembership in the Union played any role in the Respondent's decision not to process his grievance. Rather I find the sole reason for the Respondent's initial refusal was the reason stated by Marcheson, Respondent's belief that it could not represent Haungs because he had resigned from the post office.

That brings me to the crucial issue in the instant matter, and in fact the issue that the General Counsel concentrated on in its brief. The General Counsel argues therein that this decision by the Respondent was so arbitrary and unreasonable that it breached its duty of fair representation. *Mine Workers District 5 (Pennsylvania Mines Corp.)*, 317 NLRB 663, 664-665 (1995); and *Service Employees Local 87 (Cervetto Maintenance)*, 309 NLRB 817, 820 (1992). The General Counsel further asserts that the Respondent was required in order to meet its duty of fair representation to conduct some minimal investigation into Haungs' grievance. *Service Employees Local 579 (Beverly Manor Convalescent Center)* 229 NLRB 692, 695-696 (1977); and *Cervetto Maintenance*, supra.

I disagree. In my view the instant case is controlled by *Government Employees Local 888 (Bayley-Seton Hospital)*, 323 NLRB 717 (1997). There the Board, reversing the administrative law judge, found that the Union therein had not acted arbitrarily by refusing to continue processing of a grievance, because it reasonably believed that its actions were fully consistent with established law. *Id.*

Here as in *Bayley-Seton*, I conclude that the Respondent reasonably believed that it could not file a grievance on Haungs' behalf, because he had quit his employment with the post office, and therefore was ineligible to file a grievance. I note that this is the position taken by the post office, and was clearly a position that the Respondent reasonably believed to be correct. Indeed the arbitrator who subsequently decided the timeliness issue, expressed support for that view, and cited other arbitration decisions which also so concluded.

Thus, the General Counsel's cases which deal with the obligation to conduct a minimal investigation are not applicable, since the Respondent acted on the reasonable belief that it could not represent Haungs, there was no need to conduct an investigation of the merits of the grievance. The General Counsel argues in this connection that since Marcheson admittedly was not familiar with the term "constructive discharge," he was obligated to go back to his Union president to find out if such a grievance might be an exception to the general rule. I cannot conclude that Marcheson's failure to do so was so unreasonable or arbitrary to constitute a breach of the Respondent's duty of fair representation.

¹³ I also need not and do not decide whether this activity of Haungs can be construed as dissident protected conduct.

¹⁴ Indeed these very publications discuss the fact that the Respondent has processed grievances for nonmembers, and that nonmembers receive the benefits of a union representation without paying for it.

While Marcheson may not have immediately checked with his president, he did consider the possibility that the “constructive discharge” grievance might result in a different answer to the obligation to represent Haungs, since he was told that Haungs had been to the Labor Board. Therefore Marcheson in order to protect the Union’s rights, obtained oral extensions of time to file grievances from two supervisors of the postal service. While it certainly would have been a better procedure for Marcheson to have obtained these extensions in writing, in my view his failure to do so can only be construed as mere negligence, and or poor judgment and not arbitrary or unreasonable conduct. *Pacific Maritime Assn.*, 321 NLRB 822, 823–824 (1996); *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438 (1992); and *Teamsters Local 692 (Great Western Uni-freight System)* 209 NLRB 446, 447–448 (1974).

Moreover, even assuming that the Respondent’s initial the Respondent cured that initial refusal by obtaining an extension of time to file a grievance, and then subsequently filing a grievance and taking the issue to arbitration. While the Respondent was unable to convince the arbitrator that it had obtained an extension, resulting in a dismissal of the grievance based on timeliness, I again attribute this result to at most poor judgment or negligence on the part of the Respondent, and not arbitrary or unreasonable conduct.

Accordingly, based on the foregoing analysis and authorities I conclude that the Respondent has not violated Section 8(b)(1)(A) of the Act by refusing to process Haungs’ grievance concerning his alleged constructive discharge and shall recommend dismissal of this allegation.¹⁵

C. The Refusal to Process Haungs’ Grievance Concerning Supervisory Evaluations

The evidence is undisputed that Haungs made several requests of the Respondent to file grievances against the post office protesting what Haungs believed to be unfair evaluations, which in his view hampered his ability to obtain jobs at other post office facilities to which he had applied.

It is also clear that the Respondent adduced no testimony or other evidence as to what efforts if any it made to process these grievances, or why it failed to take any action concerning Haungs’ requests.

Therefore, in evaluating the Respondent’s actions with respect to this issue, it is necessary to consider the testimony of Haungs and Stiegler concerning their conversations about Haungs’ requests. I credit in this instance the testimony of Haungs as to such discussions, and conclude that Stiegler furnished him with two reasons for failing to process his grievances. First, Stiegler told Haungs that because Haungs was no longer an employee, Stiegler does not have to file grievances for him. If Stiegler had consistently maintained that position, I would conclude, as discussed above concerning the constructive discharge grievance, that such a reason was neither arbitrary nor unlawful. *Bayley-Seton*, supra.

However, Stiegler also informed Haungs in another conversation that the Respondent would not file a grievance for Haungs because he filed a charge with the National Labor Relations Board.¹⁶ In that connection, it is well settled that a union

violates Section 8(b)(1)(A) of the Act when it refuses to process a grievance of an employee because the employee filed unfair labor practice charges with the Board. *Chemical Workers Local 5–114 (Colgate-Palmolive Co.)*, 295 NLRB 742, 743 fn. 4 (1989); *ITO Corp.*, 246 NLRB 810, 812 (1979); *Graphic Arts Union 96B (Williams Printing)*, 235 NLRB 1153 (1978); and *Penn Industries*, 233 NLRB 928, 942 (1977).

Here based on the evidence set forth above, I conclude that the Respondent refused to process Haungs’ grievance concerning his evaluations for two reasons, one lawful (Haungs having resigned his employment) and one unlawful (Haungs’ protected conduct of filing charges with the Board). In such circumstances, the burden is on the Respondent to disentangle the lawful from the unlawful reason, and establish that it would have taken the same action, absent Haungs’ protected conduct. *Wright Line*, 251 NLRB 1083 (1980). Since the Respondent has adduced no evidence whatsoever as why it did not process Haungs’ grievance, it has clearly failed to meet its burden of proof in this regard.

I therefore conclude that the Respondent has violated Section 8(b)(1)(A) of the Act by failing and refusing to process Haungs’ grievances concerning his supervisory evaluations because Haungs filed charges with the National Labor Relations Board.

CONCLUSIONS OF LAW

1. The National Labor Relations Board has jurisdiction over the United States Postal Service pursuant to the provisions of the Postal Reorganization Act.

2. The Respondent, American Postal Workers Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(b)(1)(A) of the Act by refusing to process the grievance of Alan Haungs concerning his alleged constructive discharge.

4. The Respondent violated Section 8(b)(1)(A) of the Act by failing and refusing to process the grievances of Alan Haungs concerning his supervisory evaluations because Haungs filed charges with the National Labor Relations Board.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

did not know if he had to file grievances on Haungs’ behalf. In the absence of any explanation from Stiegler as to what he meant by “suing the Union,” I construe this remark as being related to the National Labor Relations Board charges and an admission by the Respondent that the charges were at least in part responsible for the Respondent’s decision not to process Haungs’ grievance.

¹⁵ In view of this finding I need not and do not make any finding concerning whether or not Haungs’ grievance had any merit or whether it was more than “frivolous.”

¹⁶ While Stiegler denied making this comment to Haungs, he did admit that he told Haungs that since Haungs was “suing the Union,” he

THE REMEDY

Having found that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

In *Rubber Workers Local 250 (Mack-Wayne Closures)*, 290 NLRB 817 (1988), the Board set forth its analysis for assessing whether a make-whole remedy is appropriate in an unlawful refusal to represent in violation of the Act. In such cases, the General Counsel has an initial burden of establishing that the employee's grievance was not clearly frivolous in order to be entitled to a provisional make-whole remedy. If the General Counsel establishes the nexus between the Union's unlawful conduct and the remedy, the burden of proof shifts to the Union to establish that the grievance was not meritorious. The Union has the option of in such circumstances, of litigating the merits of the employee's grievance at either the unfair labor practice hearing or at the subsequent compliance stage. *Id.* at 820-821.

It is therefore appropriate to evaluate the evidence of record under the standards of *Mack-Wayne*, *supra*, to determine the propriety of issuing a make-whole remedy here.

I conclude that the General Counsel has adduced sufficient evidence to meet its rather limited burden of establishing that Haungs' grievances¹⁷ were "not clearly frivolous." Here, the unrefuted testimony of Haungs indicates that after his separation from the Buffalo facility, he applied to a number of other post office locations throughout the country, and that 9 or 10 of these facilities responded that they were interested in hiring him. According to Haungs, after these facilities show interest in him, they ask for evaluations from supervisors at Haungs' prior facility. On receipt of these evaluations, Haungs further testified that these other facilities rejected his applications because of comments in these evaluations.

Further, as a result of Freedom of Information requests, Haungs was able to obtain copies of evaluations sent by the post office to facilities in Washington, D.C., Atlanta, Georgia, and St. Paul, Minnesota. Haungs subsequently wrote to the Respondent setting forth his specific complaints about these evaluations, which contend that many of the complaints set forth therein did not appear in any of his prior evaluations which appeared in his office personnel folder.

In view of the above evidence, which stands largely contradicted, I find that a reasonable argument can be made that at least parts of the evaluations were unfair, and that these evaluations may have caused Haungs not be allowed to be rehired at other post office facilities that had previously shown interest in doing so. Therefore, the grievances were "not clearly frivolous."

However, I would also note that the General Counsel faces another obstacle with respect to this issue, concerning the question of whether Haungs' grievances can be considered or can be arbitrated, because he had resigned his employment. Indeed this is the position taken by the post office with respect to his constructive discharge grievance, and I suspect a similar position will be forthcoming concerning these grievances.

While I have concluded above that the Respondent did not act unlawfully by in effect initially agreeing to this position and

not immediately filing a grievance on Haungs' behalf because he had resigned, that finding is not dispositive of the instant issue.

Thus, I concluded based on all the circumstances disclosed above, that the Respondent acted based on a reasonable interpretation of the law, *Bayley-Seton*, *supra*, and that it subsequently obtained what it believed to be a valid agreement by the post office to waive the time limits for filing a grievance. However, I did not conclude above, and I do not conclude here, that either the Respondent or the post office is necessarily correct that Haungs' resignation precludes him from filing a grievance or the Respondent from proceeding to arbitration on his behalf.

I do conclude, however, that the issue is not free from doubt, and that it is not a "clearly frivolous position," that Haungs can file a grievance notwithstanding his resignation from the post office. This issue, as well as the issue of whether Haungs' grievances are meritorious can be appropriately determined in the compliance stage of this proceeding, since the Respondent has clearly opted to litigate those issues at that time, as it is permitted to do under *Mack-Wayne*, *supra*.

Therefore, I shall issue a provisional backpay remedy under the standards of *Mack-Wayne*, *supra*. See also *Letter Carriers Local 233 (Postal Service)*, 311 NLRB 541, 542 (1993), and *Service Employees Local 87 (Cervello Maintenance)*, 309 NLRB 817 (1998). Backpay, if any, is eventually ordered, shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed according to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record I issue the following recommended¹⁸

ORDER

The Respondent, American Postal Workers Union, AFL-CIO, Buffalo, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to file and/or process grievances because the grievants have filed charges with the National Labor Relations Board.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Request the United States Post Office (USPS) to consider Alan Haungs' grievances concerning USPS' refusal to furnish him a copy of the evaluation of Haungs sent to its Hawaii facility, and USPS' allegedly unfair and retaliatory evaluations, which allegedly caused Haungs to not be rehired at the USPS' facilities in Washington, D.C., St. Paul, Minnesota, and Atlanta, Georgia, and if it refuses to do so, promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence.

¹⁷ Thus, the General Counsel need not show that the grievances are "prima facie meritorious," but only that they are "not clearly frivolous." *Newspaper Guild Local 26 (Buffalo Courier-Express)*, 220 NLRB 79 (1975).

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Permit Alan Haungs to be represented by his own counsel in the grievance and arbitration procedure, and pay the reasonable legal fees of such counsel.

(c) In the event that it is not possible to pursue the remaining stages of the grievance procedure resulting in the inability to resolve the grievances of Alan Haungs on the merits, make Haungs whole, with interest, for any loss of pay he may have suffered as a result of its unlawful conduct in failing to process his grievance.

(d) Within 14 days after service by the Region, post at its offices and meeting halls, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Re-

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(e) Within 14 days after service by the Region, deliver to the Regional Director for Region 3 signed copies of the notice in sufficient numbers to be posted by United States Postal Service, if willing, at all places where notices to employees are customarily posted at its facility in Buffalo, New York.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.